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ABOLITION OF THE MENTAL ILLNESS DEFENSE

STEPHEN C. RATHKE†

Criminal intent or mens rea is an essential element of most crimes. Yet even if an accused intended the consequences of his criminal act, he will be acquitted if he successfully invokes the insanity defense. In this Article, Mr. Rathke argues that the insanity defense has become obsolete. Is the defense really needed when the accused acted intentionally but failed to appreciate the wrongful nature of his act due to mental illness or deficiency? Should the consequences of conviction rule the determination of guilt? After surveying the various modifications the insanity defense has suffered to appease its critics, Mr. Rathke concludes that the defense is too infirm to save and that the interests of the community and criminal defendants will effectively and constitutionally be served by abolition of the insanity defense. ‡

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‡ After this Article had gone to the printer the Minnesota Supreme Court held that a defendant had a constitutional right to assert insanity as a defense to criminal charges, *State v. Hoffman*, 328 N.W.2d 709 (Minn. 1982), but that the defendant had no right to present psychiatric testimony on the issue of intent. *State v. Bouwman*, 328 N.W.2d 703 (Minn. 1982). The validity of Mr. Rathke's analysis and criticism is not diminished by these decisions. Mr. Rathke's discussion accommodates the concerns raised in these decisions by advocating the elimination of the bifurcated trial and the legislatively declared admissibility of psychiatric expert testimony on the issue of intent.

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I. INTRODUCTION

The purpose of this article is to present an argument for eliminating the defenses of mental illness and mental deficiency from Minnesota criminal law. A thoughtful person's first impression of this proposal might well be negative. If a fundamental purpose of criminal law is to visit society's retribution upon those who disobey predefined rules, then how can society punish those who, because of a mental disorder, cannot appreciate the law's command? After all, a "basic postulate of our criminal law is a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong."¹ Although it might be difficult to locate a single human embodiment of this prototypical criminal, his theoretical existence makes us all feel more comfortable about building new jails and prisons to accommodate him. Those suffering from mental disorders—the mentally ill, the insane, the retarded—do not conform to this free-agent criminal prototype and, so the argument goes, must be dealt with outside the criminal justice system.

Excluding a segment of the population from the "benefits" of the criminal justice system by labeling them "mentally ill" is a mistake. If a person, while possessing the state of mind requisite to acknowledge his conduct as criminal, commits an act that the law defines as antisocial, that person is blameworthy. The factor in that person's make-up which motivated him to intentionally commit a prohibited act may be of concern to sociologists, psychiatrists, and psychologists, and may even merit mention in a presentence investigation report. It should not, however, excuse

1. *State v. Rawland*, 294 Minn. 17, 32, 199 N.W.2d 774, 783 (1972). The supreme court makes this statement no less than four times in its opinion. *Id.* at 32, 37, 42, 43, 199 N.W.2d at 783, 785, 788. The court was quoting 21 AM. JUR. 2d, *Criminal Law* § 48 (1967), which was quoting *Morrisette v. United States*, 342 U.S. 246, 250 n.4 (1952), which was in turn quoting Pound, *Introduction* to F. SAYRE, *CASES ON CRIMINAL LAW* xxxvi-xxxvii (1927).

that person from the societal blame proclaimed in the guilty verdict.

Abolition of the insanity defense has the advantages of affording greater protection to society,² fairer treatment to mentally ill persons,³ and increased effectiveness in the administration of justice.⁴ Although this assertion will be analyzed within the context of Minnesota law, the arguments contained herein apply with equal force in other jurisdictions.

II. MENTAL ILLNESS—MINNESOTA'S APPROACH

A. Historical Development

Minnesota is more traditional in its approach to the defenses of mental illness and mental deficiency than most states.⁵ In 1865 the Minnesota Supreme Court adopted the *M'Naghten*⁶ test with respect to insanity.⁷ The court's decision was codified in 1885.⁸ The statute in its present form states as follows:

No person shall be tried, sentenced, or punished for any crime while mentally ill or mentally deficient, so as to be incapable of understanding the proceedings or making a defense; but he shall not be excused from criminal liability except upon proof that at the time of committing the alleged criminal act he was laboring under such a defect of reason, from one of these causes, as not to know the nature of his act, or that it was wrong.⁹

The legislature replaced the words "idiocy, imbecility, lunacy, or insanity" with "mentally ill or mentally deficient" in 1971.¹⁰

Until 1954 virtually all jurisdictions followed the *M'Naghten*

2. See *infra* notes 98-118 and accompanying text.

3. See *infra* notes 119-34 and accompanying text.

4. See *infra* notes 135-55 and accompanying text.

5. For a recent comparison of the approach of the 50 states and the federal system, see Note, *The Guilty But Mentally Ill Alternative*, 8 WM. MITCHELL L.REV. 233 (1982).

6. The *M'Naghten* standard, adopted in England in 1843, states that to establish a defense of insanity the defendant must prove that

at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Daniel M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

7. State v. Gut, 13 Minn. 341, 13 Gil. 315 (1868), *aff'd*, 76 U.S. (9 Wall.) 35 (1869); State v. Shippey, 10 Minn. 223, 10 Gil. 178 (1865).

8. Penal Code of the State of Minnesota § 19 (1886).

9. MINN. STAT. § 611.026 (1980).

10. Act of May 17, 1971, ch. 352, § 1, 1971 Minn. Laws 603.

rule.¹¹ In that year the Court of Appeals of the District of Columbia determined in *Durham v. United States*¹² that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."¹³ The decision so moved Dr. Karl Menninger that he described it as "more revolutionary in its total effect than the Supreme Court decision regarding segregation."¹⁴ The writer, Chief Judge David Bazelon, was rewarded with the Isaac Ray Award, the highest honor bestowed by the American Psychiatric Association, in 1961. Policymakers, however, were less impressed; only Maine felt free to follow *Durham*.¹⁵ By 1972 even Judge Bazelon declared the *Durham* experiment a failure, and it was overruled.¹⁶ A different standard proposed by the American Law Institute (ALI) has met with greater success. The ALI test provides for the insanity defense if the accused "as a result of mental disease or defect . . . lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."¹⁷ This test has been adopted by a substantial number of states and federal circuits, by either statute or court decision.¹⁸

All this activity was duly noted by the Minnesota Supreme Court. Feeling left out of the reform movement but reluctant to overturn legislated policy, the court complained in 1967 that the *M'Naghten* test "should have been discarded with the horse and buggy."¹⁹ The court urged the legislature to repeal Minnesota

11. A notable exception, New Hampshire provides for a defense of insanity if the criminal conduct is "the offspring or product of mental disease." *State v. Pike*, 49 N.H. 399, 402 (1869). No jurisdiction followed New Hampshire until the 1954 District of Columbia Court of Appeals decision in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

12. 214 F.2d 862 (D.C. Cir. 1954).

13. *Id.* at 874-75.

14. Quoted in R. SLOVENKO, *PSYCHIATRY AND LAW* 80 (1973). The original statement appeared in Bazelon, *The Awesome Decision*, SATURDAY EVENING POST, Jan. 23, 1960, at 32, 54.

15. See *State v. Hathaway*, 161 Me. 255, 211 A.2d 558 (1965). The *Hathaway* decision was incorporated into the Maine Criminal Code. ME. REV. STAT. ANN. tit. 17-A, § 58 (Supp. 1980). Maine has since adopted the American Law Institute (ALI) test. ME. REV. STAT. ANN. tit. 17-A, §§ 38, 39 (Supp. 1981) formerly at ME. REV. STAT. ANN. tit. 15, § 102 (1964).

16. *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

17. MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

18. For a list of jurisdictions, see *People v. Drew*, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978), wherein the California Supreme Court overturned *M'Naghten* in favor of the ALI test.

19. *State v. Dhaemers*, 276 Minn. 332, 339, 150 N.W.2d 61, 66 (1967).

Statutes section 611.026 "so that the courts could develop rules for determining mental competency more in harmony with advances made in this scientific field since the announcement of the *M'Naghten* rule in 1843."²⁰ Five years later the court made a comprehensive analysis of the insanity defense in Minnesota. At that time *State v. Rawland*²¹ appeared to amend the legislatively mandated *M'Naghten* rule of section 611.026. The court stated that "the statute, strictly and literally construed, may be subject to constitutional objections."²² *Rawland* "saved" the statute by requiring that evidence "be received freely so that the factfinder can . . . take account of the entire man and his mind as a whole."²³ The court stated that "the factfinder may give credence to competent evidence that relates to cognition, volition, and capacity to control behavior."²⁴ *M'Naghten* critics, however, were disappointed when the court subsequently disavowed any intent to amend the standard. In *State v. Wendler*²⁵ the court emphasized that *Rawland* concerned itself only with the admissibility of evidence.²⁶ More recently, the court upheld the refusal of a trial judge to give a jury instruction on the capacity to control behavior.²⁷ The court has restricted its consideration of the defendant's knowledge of the "nature of the act" to his perception of its physical nature and consequences.²⁸ In determining whether the defendant knew "that it was wrong," the court has defined the question in moral rather than legal terms.²⁹

Thus, Minnesota has taken the more traditional approach to the mental illness defense. The doctrine of "irresistible impulse"—a *M'Naghten* modifier—has been expressly rejected.³⁰ By statute³¹

20. *Id.*

21. 294 Minn. 17, 199 N.W.2d 774 (1972).

22. *Id.* at 38, 199 N.W.2d at 786.

23. *Id.* at 46, 199 N.W.2d at 790.

24. *Id.*

25. 312 Minn. 432, 252 N.W.2d 266 (1977).

26. *See id.* at 434, 252 N.W.2d at 267-68.

27. *State v. Larson*, 281 N.W.2d 481, 486 (Minn. 1979).

28. In *State v. Wendler*, 312 Minn. 432, 252 N.W.2d 266 (1977), the defendant killed his sister by shooting her in the back of the head. The trial court found that defendant knew the weapon was a gun, that the victim was his sister, and that if he shot her she would die. *Id.* at 436, 252 N.W.2d at 268.

29. *State v. Bott*, 310 Minn. 331, 336, 246 N.W.2d 48, 52 (1976).

30. *See State v. Eubanks*, 277 Minn. 257, 152 N.W.2d 453 (1967); *State v. Finn*, 257 Minn. 138, 100 N.W.2d 508 (1960); *State v. Simenson*, 195 Minn. 258, 262 N.W. 638 (1935). The dubious doctrine of "irresistible impulse" exonerates a person who passes the *M'Naghten* test but "his will . . . has been otherwise than voluntarily so completely de-

and by court decision,³² a Minnesota defendant has the burden of proving that he was so mentally ill or defective that he merits an acquittal.³³

B. Current Procedures

Other procedural aspects of the mental illness defense are governed by Rule 20 of the Minnesota Rules of Criminal Procedure.³⁴ Rule 20.01 provides for a mental examination to determine if the defendant is competent to stand trial.³⁵ If the trial court orders an examination pursuant to both Rules 20.01 and 20.02, the examining agency studies the defendant's competence to stand trial and whether the defendant has a valid mental illness defense. Referrals can be made either to the Security Hospital at St. Peter, the

stroyed that his actions are not subject to it, but are beyond his control." *Davis v. United States*, 165 U.S. 373, 378 (1897).

31. MINN. STAT. § 611.025 (1980) provides that "a person is presumed to be responsible for his acts and the burden of rebutting such presumption is upon him."

32. *See, e.g.*, *State v. Bott*, 310 Minn. 331, 246 N.W.2d 48 (1976); *State v. Mytych*, 292 Minn. 248, 194 N.W.2d 276 (1972); *State v. Hoskins*, 292 Minn. 111, 193 N.W.2d 802 (1972).

33. This placement of the burden of proof is undoubtedly constitutional. In *Leland v. Oregon*, 343 U.S. 790 (1952), the Court upheld a statute requiring the defendant to prove insanity beyond a reasonable doubt. Any fear that *Mullaney v. Wilbur*, 421 U.S. 684 (1975), overruled *Leland* was put to rest by *Patterson v. New York*, 432 U.S. 197 (1977), where the Court refused to require the state to disprove an affirmative defense beyond a reasonable doubt. For a comparison of the approach of the various states, see *Annot.*, 17 A.L.R.3d 146 (1968).

34. The rules were promulgated pursuant to MINN. STAT. § 480.059 (1980) and went into effect on July 1, 1975.

35. MINN. R. CRIM. P. 20.01 states in part:

Subd. 1. Competency to Proceed Defined. No person shall be tried or sentenced for any offense while mentally ill or mentally deficient so as to be incapable of understanding the proceedings or participating in his defense.

Subd. 2. Proceedings. If during the pending proceedings, the court in which a criminal case is pending determines upon motion of the prosecuting attorney, defense counsel, or on its own motion that there is reason to doubt the defendant's competency as defined by this rule, the court shall proceed as follows:

(3) *Medical Examination.* The court shall appoint at least one qualified psychiatrist or clinical psychologist or physician experienced in the field of mental illness to examine the defendant and to report to the court on his mental condition. The court may order the defendant confined in a state mental hospital or other suitable hospital or facility for the purpose of such examination for a specified period not to exceed 60 days. If the defendant or prosecution has retained a qualified psychiatrist or clinical psychologist or physician experienced in the field of mental illness, the court on request of the defendant or prosecuting attorney shall direct that such psychiatrist or psychologist or physician be permitted to observe the examination and to conduct his own examination of the defendant.

regional institution which accepts nondangerous patients, an outpatient clinic or any private or federal hospital which will accept the defendant. The defendant may opt for a bifurcated trial pursuant to Rule 20.02, subdivision 6(2).³⁶ Through that procedure, the defendant can prohibit the admission of evidence, obtained through the 20.01 and 20.02 examinations, from the "guilt" phase of the trial. During that first phase, the jury must determine whether the prosecution has proved the essential elements of the offense. The trial court may not instruct the jury on the consequences of its verdict.³⁷

Until 1968, if a person was found not guilty by reason of insanity, the trial court possessed authority to commit the defendant to a facility for the criminally insane for an indefinite period. *Bolton v. Harris*³⁸ cast constitutional doubt upon that procedure. Nevertheless, this process went unchanged in Minnesota until the supreme court promulgated the Rules of Criminal Procedure in 1975.³⁹ Rule 20.02, subdivision 8, now gives the trial court authority to "cause" civil commitment proceedings to commence and permits the defendant, in spite of the not guilty verdict, to be detained pending the commitment proceedings.⁴⁰ The decision to institute civil commitment proceedings, however, rests with the

36. MINN. R. CRIM. P. 20.02(6) provides:

(2) *Defendant's Election*. If a defendant notifies the prosecuting attorney under Rule 9.02, subd. 1(3)(a) of his intention to rely on the defense of mental illness or mental deficiency together with a defense of not guilty, or if the defendant in a misdemeanor case pleads both not guilty and not guilty by reason of mental illness or mental deficiency the defendant shall elect:

(1) Whether there shall be a separation of the two defenses with a sequential order of proof before the court or jury in a continuous trial in which the defense of not guilty shall be heard and determined first, and then the defense of the defendant's mental illness or deficiency; or

(2) Whether the two defenses shall be tried and submitted together to the court or jury.

In felony and gross misdemeanor cases, the defendant's election shall be made at the Omnibus Hearing under Rule 11. In misdemeanor cases, the defendant's election shall be made at the pretrial conference under Rule 12 if held and otherwise shall be made immediately prior to trial.

37. *State v. Bott*, 310 Minn. 331, 246 N.W.2d 48 (1976).

38. 395 F.2d 642 (D.C. Cir. 1968). The court held that such mandatory commitment was violative of the fourteenth amendment. *See id.* at 650-53.

39. MINN. STAT. § 631.19 (1978) governed past procedure and provided authority for the trial court to "forthwith, commit such person to the proper state hospital for safekeeping and treatment." If the defendant had "homicidal tendencies," the commitment was to the security hospital. The statute was suspended by Rule 20 in 1975. The legislature repealed section 631.19 in 1979. *See* Act of May 29, 1979, ch. 233, § 42, 1979 Minn. Laws 485.

40. MINN. R. CRIM. P. 20.02(8) provides that "[w]hen a defendant is found not guilty by reason of mental illness . . . [but is] not under [civil] commitment, the court shall cause

county attorney not with the court.⁴¹ The county attorney, after unsuccessfully attempting to convince a jury of the defendant's sanity, suddenly may find himself in county court advocating the former defendant's commitment as mentally ill and perhaps dangerous. Because the vast majority of insanity defenses are raised in felony cases, the court having jurisdiction over the civil commitment proceedings is altogether different.⁴² The general rules of evidence govern civil commitment procedures.⁴³ The former defendant is free to deny his or her participation in the act which gave rise to the original trial, putting the authorities to the burden of proof. Nothing exists to differentiate commitment proceedings of those acquitted by reason of mental illness from any other commitment proceedings.⁴⁴

As of August 1, 1982, under Minnesota's new civil commitment statute, only if a person is committed as mentally ill and dangerous must he undergo special review for discharge from commitment.⁴⁵ Persons under a general commitment as mentally ill may be re-

civil commitment proceedings to be instituted against him and that the defendant be detained in a state hospital or other facility pending completion of the proceedings."

41. The court that heard the criminal case may petition for commitment, *see* Minnesota Commitment Act of 1982, ch. 581, § 7, 1982 Minn. Sess. Law Serv. 1286, 1293 (West) (to be codified at MINN. STAT. § 253B.07(1)(f)), but the county attorney has discretion to decide whether to pursue commitment proceedings beyond the pre-petition screening. *See id.* § 7, 1982 Minn. Sess. Law Serv. at 1293 (to be codified at MINN. STAT. § 253B.01(1)(c), (d)). MINN. STAT. § 253A.07(15) (1980) used to provide explicit authority for the county attorney to represent the petitioner. As a practical matter, petitions for civil commitment, which are similar to criminal complaints, are prepared and issued at the discretion of the county attorney.

42. Jurisdiction for civil commitment proceedings rests in the probate court. *See* Minnesota Commitment Act of 1982, ch. 598, § 7, 1982 Minn. Sess. Law Serv. 1286, 1293 (to be codified at MINN. STAT. § 253B.07(2)). The new Minnesota Commitment Act, which became effective August 1, 1982, did not alter jurisdiction for civil commitment. *Compare id.* with MINN. STAT. § 253A.07(1) (1980). In all but Hennepin and Ramsey counties, probate court is a division of county court. *See id.* §§ 487.01(1), 525.011(1). In those two counties, probate court is a division of district court.

43. *See* Minnesota Commitment Act of 1982, ch. 581, § 8, 1982 Minn. Sess. Law Serv. 1286, 1296 (West) (to be codified at MINN. STAT. § 253B.08(7)). Formerly MINN. STAT. § 253A.07(17) (1980) required similar compliance with the rules of evidence.

44. *See* Minnesota Commitment Act of 1982, ch. 581, 1982 Minn. Sess. Law Serv. 1286 (West) (to be codified at MINN. STAT. §§ 253B.01-23). Neither did the former law make any differentiation in the commitment proceedings. *See* MINN. STAT. § 253A.07 (1980).

45. *See* Minnesota Commitment Act of 1982, ch. 581, § 18, 1982 Minn. Sess. Law Serv. 1286, 1304 (to be codified at MINN. STAT. § 253B.18). Minnesota law used to provide for special procedures regarding the discharge from commitment of those acquitted of criminal charges by reason of mental illness. *See* MINN. STAT. § 253A.15(1) (1980).

leased at any time by hospital authorities.⁴⁶ The original trial court, however, retains jurisdiction of those found not guilty by reason of mental illness.⁴⁷ After the trial court is notified by hospital authorities of any proposed discharge, it must hold a hearing to determine if the defendant is still mentally ill or dangerous. The rules specify no burden or standard of proof.⁴⁸ Because the civil commitment procedure for those found not guilty by reason of mental illness is entirely *de novo*, a person acquitted of criminal responsibility on the basis of insanity later can be found not in need of civil commitment.

C. Criminal Intent

The concept of criminal intent or *mens rea* has an important but often neglected place in a discussion of the relationship between crime and mental illness. Virtually all crimes in Minnesota of any consequence require some form of criminal intent. One is not criminally responsible for breaking another's window or arm unless one has the intent to do so. A more specific intent is required for crimes such as burglary (entry with intent to steal) or murder (intent to kill).⁴⁹ Criminal intent is defined by statute:

(1) When criminal intent is an element of a crime in this chapter, such intent is indicated by the term "intentionally," the phrase "with intent to," the phrase "with intent that," or some form of verbs "know" or "believe."

(2) "Know" requires only that the actor believes that the specified fact exists.

(3) "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified or believes that his act, if successful, will cause that result. In addition, except as provided in clause (6), the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word "intentionally."

(4) "With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result

46. See Minnesota Commitment Act of 1982, ch. 581, § 16, 1982 Minn. Sess. Law Serv. 1286, 1302 (West) (to be codified at MINN. STAT. § 253B.16).

47. See MINN. R. CRIM. P. § 20.02, subd. 8(4).

48. The supreme court has cautioned, however, that the trial court is "not at liberty to substitute its nonprofessional prognosis for that of the medically trained witnesses who were of a different view." *Warner v. State*, 309 Minn. 333, 339, 244 N.W.2d 640, 644 (1976) (citing *State v. Rawland*, 294 Minn. 17, 40, 199 N.W.2d 774, 787 (1972)).

49. MINN. STAT. §§ 609.185, 609.19, 609.58 (1980).

specified or believes that his act, if successful, will cause that result.

(5) Criminal intent does not require proof of knowledge of the existence or constitutionality of the statute under which he is prosecuted or the scope of meaning of the terms used in that statute.

(6) Criminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime in question.⁵⁰

When instructing juries, the trial courts generally read only the pertinent portions of this statute.

Because criminal intent usually is an essential element of the offense charged, the question of whether evidence of mental illness is admissible to negate the criminal intent necessarily arises. Voluntary intoxication has long been recognized as a factor for the jury to consider with respect to criminal intent.⁵¹ The State Model Jury Instruction Guide provides the following charge:

It is not a defense to a crime that defendant was intoxicated at the time of his act if he voluntarily became intoxicated. But where, as in this case, it is an element of a crime that defendant have had a particular intent, you should consider whether the defendant was intoxicated, and if so, whether the defendant was capable of forming the required intent. The State must prove beyond a reasonable doubt that defendant had the required intent.⁵²

If voluntary intoxication can negate criminal intent, by which logic can a trial court prohibit evidence that the defendant's intention is befuddled by mental illness? No Minnesota appellate court has spoken on this issue, and the Model Criminal Jury Instruction Guide is likewise silent.⁵³ A surprising number of courts in other states have excluded evidence of mental illness bearing on the issue of intent—stating, in effect, that insanity is either a complete de-

50. *Id.* § 609.02(9).

51. *Id.* § 609.075:

An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind.

52. *See* 10 MINNESOTA PRACTICE JIG, 7.03 (1977).

53. At least one commentator, however, has stated that because Minnesota has no "diminished capacity" statute, "criminal responsibility is an all-or-nothing proposition." MINNESOTA COUNTY ATTORNEYS COUNCIL, MEETING THE DEFENSE: INSANITY 10 (1978).

fense or none at all.⁵⁴ These decisions are unsound. In a case of murder in the first degree, the specific intent to kill is an essential element of the offense which must be proved by the government beyond a reasonable doubt.⁵⁵ If this intent is not proved, the defendant nonetheless may be found guilty of unintentional murder or manslaughter.⁵⁶ If a defendant may present evidence that excessive drinking, ingestion of controlled substances, stupidity, or bad luck negated his intent, how can a trial court deny him the opportunity to demonstrate that his mental illness had a similar effect?⁵⁷ If evidence negating intent were excluded and the defendant convicted of a crime that required the state to prove a specific criminal intent, the supreme court would have to reverse because the trial court precluded the defendant from offering relevant evidence negating an essential element of the offense.

Admitting evidence of a mental disorder to show a lack of intent, of course, plays havoc with the bifurcation procedures of Rule 20. During the "guilt" phase of a murder trial, the defendant could elicit psychiatric testimony that related to his inability to form the specific intent to kill. If the prosecution could not prove this specific intent beyond a reasonable doubt, the defendant would be entitled to a verdict of guilty to a lesser degree of homicide. The testimony in the second phase of the trial would, to a great extent, repeat that of the first. The defendant could call the same psychiatrists to elicit virtually the same evidence in an effort

54. *See, e.g.*, *State v. Janovic*, 101 Ariz. 203, 417 P.2d 527 (1966), *cert. denied*, 385 U.S. 1036 (1967); *State v. Jones*, 359 So. 2d 95 (La.), *cert. denied*, 439 U.S. 1049 (1978). Cases are collected at Annot., 22 A.L.R.3d 1228 (1968).

55. MINN. STAT. § 609.185 (Supp. 1981). There is one exception to the requirement of specific intent. The statute provides that when death occurs "while committing or attempting to commit criminal sexual conduct in the first or second degree with force or violence, either upon or affecting the person or another," *id.* § 609.185(2), specific intent is not required.

56. The 1981 legislature moved unintentional felony murder from third to second degree. *See* Act of May 20, 1981, ch. 227, § 19, 1981 Minn. Laws 1010 (codified at MINN. STAT. § 609.19(2) (Supp. 1981)). Manslaughter in the first degree includes heat-of-passion killings and unintentional homicides during the commission of misdemeanor or gross misdemeanor crimes. *See* MINN. STAT. § 609.20 (Supp. 1981). Negligent homicides are designated as second degree manslaughter. *See id.* § 609.205.

57. Such evidence is certainly relevant pursuant to Rule 401 of the Rules of Evidence promulgated by the supreme court in 1977. Recent cases have held that it is a denial of due process to exclude evidence of mental illness in the first phase of the bifurcated trial. *See, e.g.*, *Hughes v. Matthews*, 576 F.2d 1250 (7th Cir.), *cert. dismissed*, *Israel v. Hughes*, 439 U.S. 801 (1978); *State v. Shaw*, 106 Ariz. 103, 471 P.2d 715 (1970), *cert. denied*, 400 U.S. 1009 (1971); *State ex rel. Boyd v. Green*, 355 So. 2d 789 (Fla. 1978); *Sanchez v. State*, 567 P.2d 270 (Wyo. 1977).

to obtain a complete acquittal due to mental illness. This scenario is wasteful but unavoidable and, by itself, sufficient reason to scrap the bifurcation process.

The recent case of *State v. Mikulanec*⁵⁸ demonstrates the status of the mental illness defense in Minnesota. June Mikulanec was a twenty-seven-year-old keypunch operator. Until her arrest she had never been diagnosed or treated in any manner for mental illness. She developed a particular obsession for a male friend who dated her occasionally. She told her co-workers that this relationship was far more serious than it really was, and even bought an engagement ring which she represented as a gift from him. Her "boyfriend" married another woman. Mikulanec responded by inflicting ninety-seven knife wounds on her rival. The murder had several aspects of premeditation, including the calculation of when the husband would be absent, a ruse to get into the victim's house, and an elaborate coverup to mislead police into thinking that the crime was motivated by rape.⁵⁹

The jury found Mikulanec not guilty by reason of mental illness. During the first stage of her bifurcated trial, the defense put the state to its burden of proving that Mikulanec was the real killer. Thus, criminal intent was not at issue. The jury found, by virtue of fairly conclusive circumstantial evidence, that Mikulanec had killed the victim. At the second stage, the defense psychiatrists diagnosed Mikulanec as suffering from "hysterical psychosis,"⁶⁰ notwithstanding that this supposed illness is not mentioned in the American Psychiatric Association's classification guide of mental disorders.⁶¹ The prosecution psychiatrist found no psychosis and testified that the killing was motivated by anger and jealousy. Mikulanec was found not guilty by reason of insanity.⁶²

After expending great efforts to prove Mikulanec's sanity, the county attorney's office found itself in the awkward position of petitioning to commit her as mentally ill and dangerous. They succeeded in committing her, notwithstanding Mikulanec's attorney's protest that she was no longer "dangerous." One year later Mikulanec was still unsuccessful at removing the designation of "dangerous" and she remains, at this writing, in a locked ward. Her

58. *State v. Mikulanec*, No. 69142 (Minn. 4th Dist. Ct. Aug. 23, 1978).

59. *Id.*

60. *Id.*

61. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS ch. 3 (3d ed. 1981) (commonly known as DSM-III).

62. *State v. Mikulanec*, No. 69142 (Minn. 4th Dist. Ct. Aug. 23, 1978).

keepers contend that, at the very least, she should be transferred to the open, unsecured portion of the hospital.⁶³

At all stages the case generated a great deal of publicity. Is Mikulanec really dangerous? Is there any justification for her continued confinement in a mental hospital other than an aversion to the publicity that her release would cause? Is Mikulanec a political prisoner? Under the thesis outlined in this article, these questions would be avoided. Mikulanec's elaborate preparation and attempts at concealment would have established her premeditated intent. She would be serving a life sentence for murder.

The case of *State v. Sheppo*⁶⁴ presents a more difficult question. Cora Sheppo was acquitted of killing her grandson by reason of mental illness. She believed, and believes to this day, that the killing was necessary to purge the victim of internal demons and assure his everlasting salvation. Because she was convinced of the rightness of her action, her acquittal pursuant to the *M'Naghten* standard was unavoidable. Sheppo acted with the specific intent to kill.⁶⁵ Under the proposal outlined in this article, she, as well as Mikulanec, would be convicted of murder.

III. A PROPOSAL TO ABOLISH THE DEFENSES OF MENTAL ILLNESS AND MENTAL DEFICIENCY

The legislature should strike the *M'Naghten* language from Minnesota Statutes, section 611.026 and substitute the following:

It is a defense to a prosecution under any statute that the defendant, as a result of mental illness or mental deficiency, lacked the criminal intent as defined by section 609.02, subdivision 9, required as an element of the offense charged. Mental illness or mental deficiency does not otherwise constitute a defense.⁶⁶

This proposal would abolish mental illness and mental deficiency as a defense to an otherwise criminal act. It would prohibit the judiciary from resurrecting any test—*M'Naghten*, *Durham*, or

63. See *In re Mikulanec*, item IX, hearing of November 14, 1979 before the Special Review Bd., Dep't of Pub. Welfare (on file at William Mitchell Law Review office).

64. *State v. Sheppo*, No. 76566 (Minn. 4th Dist. Ct. Jan. 14, 1981).

65. *Id.*

66. MINN. STAT. § 611.026 (1980) currently reads:

No person shall be tried, sentenced, or punished for any crime while mentally ill or mentally deficient so as to be incapable of understanding the proceedings or making a defense; but he shall not be excused from criminal liability except upon proof that at the time of committing the alleged criminal act he was laboring under such a defect of reason, from one of these causes, as not to know the nature of his act, or that it was wrong.

ALI—as a common-law substitute for the statute. The first sentence says nothing more than the proposition that the state's inability to prove any one of the essential elements of the offense is a defense to a criminal charge. The second sentence states the legislative intent. The courts are thereby on notice that the legislature has reserved this policy question for itself.

Some persons accused of a crime are so mentally ill or deficient that they cannot assist in their defense.⁶⁷ This proposal does not affect them. These persons are beyond the scope of criminal sanctions, not because they are mentally ill but because a defendant must be capable of participating in his defense. To try or sentence a person so grossly mentally ill that he could not assist in his defense would offend anyone's sense of justice as well as the due process clause.⁶⁸ Thus, if a person charged with a crime appears to be out of touch with reality, the trial court should order a competency study pursuant to Rule 20.01. If the defendant is found incompetent, prosecution authorities would commence proceedings for civil commitment.

The current procedure appears to work well, and the actors are not forced into inconsistent positions. In Minnesota, most competency opinions are obtained from psychiatrists and psychologists at the several state hospitals operated by the Department of Public Welfare. Prosecutors and defense attorneys generally accept the opinions and forego retaining a second set of experts. The trial court has little difficulty affirming the one opinion at its disposal. If the defendant is found incompetent to stand trial, the prosecutor has the benefit of the Rule 20.01 examination in the civil commitment procedure. If the underlying criminal charge is a misdemeanor, the charge is dismissed.⁶⁹ Gross misdemeanors and all felonies except murder are automatically dismissed if the defendant has not achieved competence within three years, unless the state files a notice of intent to prosecute whenever the defendant becomes competent.⁷⁰ As a practical matter, few prosecutors are interested in resurrecting any but the most serious felony prosecu-

67. *Id.* The statute provides that "[n]o person shall be tried, sentenced, or punished for any crime while mentally ill or mentally deficient so as to be incapable of . . . making a defense." *Id.* The pertinent procedure is set forth in MINN. R. CRIM. P. 20.01.

68. *See* *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *Pate v. Robinson*, 383 U.S. 375, 378 (1966); *Bishop v. United States*, 223 F.2d 582, 584 (D.C. Cir. 1955); *State v. Swain*, 269 N.W.2d 707, 719 (Minn. 1978).

69. MINN. R. CRIM. P. 20.01, subd. 4(2).

70. *Id.* 20.01(6).

tions if the defendant has been incompetent to defend himself and has been held in a state institution for over a year.

Abolition of the mental illness defense would, however, greatly change the nature of the Rule 20.02 examination. The prosecutor and defense attorney would need to carefully inform the examining expert of the essential elements of the offense charged and any possible, lesser-included offenses. The capacity to form a particular intent would be the key issue. In a homicide prosecution, for example, the expert would need a thorough understanding of the different levels of purposefulness specified by the law, ranging from premeditation to culpable negligence.⁷¹ After examining the defendant's mental state and any data supplied by investigating personnel, the expert would attempt to form an opinion with respect to whether the defendant, at the time of the act, was unable, because of a mental disorder, to form the criminal intent that the law requires for the crime under consideration.

In most trials where mental illness or deficiency is at issue, the identity of the actor is admitted. The defense attorney would attempt to elicit, through cross-examination of the state's witnesses, evidence of bizarre or unnatural behavior. The prosecution would decide to call its expert to testify on the question of intent during the case in chief if the rest of the evidence would not survive a motion for directed verdict on the issue of intent without the expert. The state has the burden of proof on the issue of intent. If defense counsel's cross-examination were sufficient to raise a doubt in the jury's mind on the question of intent, the prosecutor should call his expert before resting. Tactical considerations may suggest keeping some "intent" evidence reserved for rebuttal.

The bifurcated trial, of course, would be eliminated. The proper question for the jury at the end of the trial is whether the

71. With stated exceptions, a conviction for first degree murder requires a showing of premeditation and specific intent to kill. MINN. STAT. § 609.185(1) (Supp. 1981). Proof of premeditation is not required when the victim was a police officer or the killing occurred during a burglary, kidnapping, first or second degree arson, aggravated robbery, escape from custody or first degree tampering with a witness. *Id.* §§ 609.185(3), (4). Neither premeditation or specific intent to kill is necessary when the death occurs during the commission or attempt to commit first or second degree criminal sexual conduct with force or violence. *Id.* § 609.185(2).

Except when death occurs during commission or attempt to commit a felony, other than first or second degree criminal sexual conduct, conviction of second degree murder requires proof of intent to kill. *Id.* § 609.19.

A person who is culpably negligent by creating an unreasonable risk and consciously taking chances of death or causing great bodily harm to another, is guilty of second degree manslaughter. *Id.* § 609.205 (1980).

state has proved all of the essential elements beyond a reasonable doubt. The only burden upon the defense is the practical, but not legal, necessity of coming forward with evidence to rebut the common-sense presumption that a person intends the natural consequence of his voluntary acts.⁷² If the defense elects to defend solely on the question of identity, evidence derived from court-ordered mental evaluations should remain inadmissible.⁷³ In certain cases, however, the defense may contend that the defendant neither committed the act nor was capable of forming the intent to do so. If the defendant denies to the examining expert that he committed the act, the expert would have to testify in the framework of a hypothetical question.⁷⁴ If the defendant admits the act to the psychiatrist further problems arise. By raising the issue of incapacity to form intent by reason of mental illness, the defendant waives the inadmissibility of his admission. This dilemma for the defense should not disturb anyone who views a trial as a factfinding procedure.

At the close of the testimony and final arguments, the trial court would carefully instruct the jury regarding the essential elements of the crime charged and any lesser-included offenses. The judge would emphasize that the state has the obligation of proving all of the essential elements of the offense beyond a reasonable doubt. When explaining the element of intent the judge would read the relevant portions of Minnesota Statutes, section 609.02, subdivision 9. The court would further instruct as follows:

It is not a defense to a crime that the defendant was mentally ill at the time of his act or that he still is mentally ill. But where, as in this case, intent, as I defined it to you, is an element of a crime, you should consider whether the defendant was mentally ill, and if so, whether the defendant was capable of forming the required intent. The state must prove beyond a reasonable doubt that the defendant had the intent which the law requires.

72. In *Sandstrom v. Montana*, 442 U.S. 510 (1979), the United States Supreme Court held that due process is violated by an instruction to the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." In *State v. Ellert*, 301 N.W.2d 320 (Minn. 1981), the trial court instructed the jury that it is presumed that a person intends his or her voluntary act. Because the lower court did not attribute that presumption to "the law," the Minnesota Supreme Court distinguished *Sandstrom* and affirmed the conviction. *Id.* at 323.

73. MINN. R. CRIM. P. 20.02(5).

74. The defense attorney would pose a question which assumes the facts of the crime and that the defendant, whom the expert has examined, is the perpetrator.

The jury would have at its disposal a guilty verdict for the crime charged, a guilty verdict for each lesser-included offense, and a not guilty verdict. For the unusual case where the identity of the actor is at issue, the not guilty verdict should have at its foot the following question:

Do you find beyond a reasonable doubt that the defendant committed the act in question but are unable to find beyond a reasonable doubt that he had the capacity to form the required intent?⁷⁵

This question should be asked to put to rest the question of the identity of the actor. If answered in the affirmative, the parties involved, and, later, treatment personnel, can assume that the defendant committed the act. Although theoretically the civil commitment process is *de novo*, the parties involved, including the probate court, are entitled to place some value on the criminal trial jury's answer to this question.

The jury should be informed of the potential for civil commitment. The defendant benefits because the jury is assured that in the event of a not guilty verdict further legal proceedings are possible which may result in further confinement and treatment. The prosecution benefits because the jury knows that commitment is not automatic, especially if the defendant is no longer psychotic.

This article by no means pioneers discussion of the abolition of the mental illness defense. For the past twenty years, the controversial Dr. Thomas S. Szasz has advocated the abolition of the defense.⁷⁶ Other theoreticians have concurred.⁷⁷ The noted criminal law professor Norval Morris argued for abolition in 1963,⁷⁸ and his ideas have been mirrored in a number of law review articles.⁷⁹ The popular press has also criticized the defense.⁸⁰ In a most ironic development Judge David Bazelon, the author of *Dur-*

75. The state district judges have approved special questions on criminal verdict forms. *See, e.g.*, MINNESOTA PRACTICE JIG, 16.02, 16.23 (1977). The Minnesota jury instructions for theft and receiving stolen property include the element of knowledge and belief that the action was wrong.

76. *See* T. SZASZ, LAW, LIBERTY AND PSYCHIATRY 123-37, 228-29 (1963) [hereinafter cited as T. SZASZ, LAW, LIBERTY AND PSYCHIATRY]; *see also*, T. SZASZ, THE MYTH OF MENTAL ILLNESS: FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT (rev. ed. 1974).

77. *See, e.g.*, S. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME 205-59, 341-42 (1971); H.L.A. HART, THE MORALITY OF THE CRIMINAL LAW 24-25 (1965); B. WOOTEN, CRIME AND THE CRIMINAL LAW 31-93 (1981).

78. Morris, *Psychiatry and the Dangerous Criminal*, 41 SO. CAL. L. REV. 514 (1968).

79. *See* Caesar, *The Insanity Defense: The New Loophole*, 25 CRIME & DELINQ. 436 (1979); Goldstein, *The Brauner Rule—Why? Or No More Nonsense on Non Sense in the Criminal Law, Please!*, 1973 WASH. U.L.Q. 126; Goldstein & Katz, *Abolish the "Insanity Defense"*—

ham,⁸¹ has come full circle and advocated abolition.⁸²

At least five legislative bodies have seriously considered abolishing the insanity defense. In 1975 the United States Senate Judiciary Committee reported to the floor a position on the defense identical to that advocated in this article.⁸³ The fact that this proposal was part of the Nixon administration's controversial S.1 bill accounts for at least some of the aversion to the idea.⁸⁴ That portion of the bill was deleted in 1977, although the committee report of that year continued to favor abolition.⁸⁵ President Reagan recently introduced the Crime Control Act of 1982 which again

Why Not?, 72 YALE L.J. 853 (1963); Spring, *The End of Insanity*, 19 WASHBURN L.J. 23 (1979).

80. A recent article in *U.S. News & World Report* describes how a 26-year-old Chicago killer wrote an article to a fellow inmate entitled "How to Beat a Murder Rap by Insanity." The writer, Thomas Vanda, had been found not guilty by reason of insanity of the murder of a 15-year-old girl. Fifteen months after his acquittal Vanda was also accused of the murder of a second young female. His plea: not guilty by reason of insanity. *Behind Growing Outrage over Insanity Pleas*, U.S. NEWS & WORLD REP., May 7, 1979, at 41; see also Szasz, *Mercenary Psychiatry*, 174 NEW REPUBLIC, Mar. 13, 1976, at 10, 90; *The Insanity Defense: Under Fire*, U.S. NEWS & WORLD REP., Apr. 20, 1981, at 11.

81. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), sets forth the most liberal test of mental illness ever formulated in this country.

82. See Bazelon, *Can We Afford Not to Live Up to Our Moral Pretenses?*, 49 N.Y.S.B.J. 10 (1977).

83. SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS., REPORT ON THE CRIMINAL JUSTICE REFORM ACT OF 1975 TO ACCOMPANY S1 103-17 (Comm. Print 1975). Although several bills are still before the Senate that advocate what is referred to as the mens rea test, i.e., limiting evidence of insanity to the issue of the state of mind requisite for the offense, see, e.g., S. 818, S. 2672, S. 2745, 97th Cong., 2d Sess., 128 CONG. REC. S11291 (daily ed. Sept. 14, 1982) (summary of bills provided by Sen. Thurmond), the Senate Judiciary Committee has altered its position to advocate a modified *M'Naghten* test that would make insanity an affirmative defense and place the burden of persuasion on the defendant. See S. 2902, 97th Cong., 2d Sess. § 1, 128 CONG. REC. S11392, S11392 (daily ed. Sept. 14, 1982) (sponsored by Sen. Thurmond).

84. For three articles critical of the proposal seemingly because the proposal was sponsored by President Nixon and John Mitchell, see Dershowitz, *Abolishing the Insanity Defense: The Most Significant Feature of the Administration's Proposed Criminal Code—An Essay*, 9 CRIM. L. BULL. 434 (1973); N.Y.U. Colloquium, *President Nixon's Proposal on the Insanity Defense*, 1 J. PSYCHIATRY & L. 297 (1973); Platt, *The Proposal to Abolish the Federal Insanity Defense: A Critique*, 10 CAL. W.L. REV. 449 (1974). For a more balanced criticism, see Allen, *The Brawner Rule—New Lyrics for an Old Tune*, 1973 WASH. U.L.Q. 67; Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273 (1968); Monahan, *Abolish the Insanity Defense?—Not Yet*, 26 RUTGERS L. REV. 719 (1973); Wales, *An Analysis of the Proposal to "Abolish" the Insanity Defense in S. 1: Squeezing the Lemon*, 124 U. PA. L. REV. 687 (1976).

85. The judiciary committee's report in 1977 was virtually identical to its earlier position but closed with the following comment:

[T]he approach [abolishing the defense] is not only workable but effective. S. 1437, by deleting any reference to the issue, will leave the further development of the appropriate approach to this problem to the courts in the light of experience and the accumulating insights of the varied disciplines involved.

called for limiting evidence of insanity to the issue of intent.⁸⁶ In 1978 the New York Department of Mental Hygiene presented a report to Governor Hugh Carey recommending that New York abandon its ALI test⁸⁷ and abolish the insanity defense.⁸⁸ The New York legislature amended the procedural aspects of the defense but declined to abolish it.⁸⁹

In 1979, Montana abolished the defense of mental disease or defect in criminal actions and provided an alternative sentencing procedure for the convicted defendant who was suffering from mental illness at the time he committed the offense.⁹⁰ Evidence of the defendant's mental illness is admissible in a trial on the merits only to prove that the defendant "did not have a particular state of mind which is an essential element of the offense charged."⁹¹ Only if the defendant is convicted is evidence that "he was suffering from a mental disease or defect which rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" admissible.⁹² Thus far the statute has withstood constitutional challenge.⁹³

Idaho abolished the insanity defense for complaints filed on or after July 1, 1982.⁹⁴ Evidence relating to a defendant's insanity is admissible only relating to "the issues of mens rea or any state of mind which is an element of the offense."⁹⁵

SENATE COMM. ON THE JUDICIARY, CRIMINAL CODE REFORM ACT OF 1977, S. REP. NO. 605, Part 1, 95th Cong., 1st Sess. 99 (1977) (footnote omitted).

86. THE CRIME CONTROL ACT OF 1982, S. 2903, 92d Cong., 2d Sess. § 101, 128 CONG. REC. S11404, S11404-05 (daily ed. Sept. 14, 1982) (statement by Sen. Byrd).

87. N.Y. PENAL LAW § 30.05 (McKinney 1975).

88. STATE OF NEW YORK, DEPT OF MENTAL HYGIENE, A REPORT TO GOVERNOR HUGH L. CAREY ON THE INSANITY DEFENSE IN NEW YORK (1978) [hereinafter cited as REPORT TO GOVERNOR HUGH L. CAREY].

89. The Insanity Defense Reform Act of 1980, ch. 548, 1980 N.Y. LAWS 1616.

90. Act of July 1, 1979, ch. 713, 1979 Mont. Laws 142 (current version at MONT. CODE ANN. §§ 46-14-101, -201, -202, -203, -212, -213, -221, -222, -301, -311, -312, -313, -401, 46-15-301 (1981)).

91. MONT. CODE ANN. § 46-14-201(1) (1981).

When a defendant is found not guilty for the reason that due to a mental disease or defect he could not have a particular state of mind that is an essential element of the offense charged, the court shall order a predispositional investigation . . . [and] hold a hearing to determine the appropriate disposition of the defendant.

Id. § 46-14-301(1).

92. *Id.* § 46-14-311.

93. *See* State v. McKenzie, — Mont. —, 608 P.2d 428 (1980).

94. Act of Apr. 2, 1982, ch. 368, § 2, 1982 Idaho Sess. Laws 919, 919 (codified at IDAHO CODE § 18-207(a) (Supp. 1982)).

95. *Id.* § 2, 1982 Idaho Sess. Laws at 920 (codified at IDAHO CODE § 18-207(c) (Supp. 1982)).

In 1980, the Kansas legislature took a different approach to abolishing the insanity defense.⁹⁶ The new act does not specifically limit admission of psychiatric testimony to the issue of intent, but rather declares that "[a] finding of not guilty by reason of insanity shall constitute a finding that the acquitted person committed an act constituting the offense charged or an act constituting a lesser included crime, except that the person did not possess the requisite criminal intent."⁹⁷ Implicit in this new statute is the abolition of insanity as a separate defense.

IV. ADVANTAGES OF ABOLISHING THE MENTAL ILLNESS DEFENSE

The proposal to abolish the insanity defense has attracted support because of its appeal to several constituencies. Those who regard the defense as a loophole for the guilty to escape punishment are favorably disposed to its closure. Civil libertarians concerned about fair and equal treatment for the disadvantaged are likely to prefer the due process safeguards present in the criminal justice system over the coercive therapeutic treatment that could accompany indeterminate civil commitment. Both attorneys and psychiatrists have expressed dismay over the tension that the defense causes between their two professions. Taxpayers are disturbed at the cost to the public treasury, especially in view of increasingly scarce fiscal resources.

A. Protection of Society

Although citizens are generally willing to take some responsibility for their own safety, they expect their government to provide a large measure of their personal, physical security. Prudent persons mitigate their exposure to physical violence by, for example, avoiding unsafe neighborhoods, tough saloons, and family reunions. Gun-wielding muggers, belligerent drunks, and irate aunts are easily understood and just as easily avoided—or so the common wisdom goes. But the deranged, stalking killer terrifies average citizens to a degree that bears no relation to their chances of becoming his next victim. Being cautious will not help; staying home will not help. The David Berkowitzes, Charles Whitmans, and Albert DeSalvos seen on the evening news kill for no apparent

96. Act of Apr. 9, 1980, ch. 105, 1980 Kan. Sess. Laws 483.

97. *Id.* § 1, 1980 Kan. Sess. Laws at 483 (amending KAN. STAT. ANN. § 22-3428(1)). The new statute went into effect July 1, 1980.

reason and without warning.⁹⁸ No one is safe from the mad killers depicted in *Psycho* or *Halloween*. When the insane killer in newspaper headlines is apprehended and uses his insanity as a defense, people expect their government to intervene. They want him locked up forever. The location of his confinement—insane asylum or prison—is immaterial as long as he never gets out.

The critical reader will, of course, discount the foregoing as conjuring hobgoblins and pandering to the bigotry and ignorance of the unsophisticated public. Nevertheless, the public's fear of the mentally ill and dangerous criminal is worth considering for at least three reasons. Champions of the insanity plea rarely fail to emphasize the concept of blameworthiness and the inapplicability of that concept to the mentally ill.⁹⁹ As the *Rawland* court contended, "a basic postulate of our criminal law is a free agent confronted with the choice between doing right and doing wrong and choosing freely to do the wrong."¹⁰⁰ Those who argue that this postulate is basic may be forgetting an even more basic postulate: People should be secure from those who would do them harm regardless of the wrongdoer's knowledge of good and evil. Second, abolition of the insanity defense would have no effect on the vast majority of persons who may, from time to time, suffer from mental disorders. Only those who harm others would suffer the criminal sanctions. Finally, in the last twenty years a great change has occurred with respect to treatment of the mentally ill. Gone are the days when the public could confidently expect that a mentally ill person who committed a criminal act would be confined for an extended period of time.

Dr. Szasz had protested against the broad criteria for involuntary commitment and the extended terms for which mentally ill person were confined,¹⁰¹ but reform did not occur until the development and acceptance of psychotropic medications in the 1960's.¹⁰² Through the use of these medications even an acutely

98. David Berkowitz killed six strangers with a handgun in New York from 1976 to 1977, *Crime*, 38 FACTS ON FILE 500 (1978); Charles Whitman shot 46 passersbys from a tower at the University of Texas in 1966. See J. NASH, BLOOD LETTERS AND BAD MEN 607 (1973). Albert de Salvo was suspected of being the notorious "Boston Strangler" of the 1960's. See J. GAUTE & R. ODELL, MURDERERS' WHO'S WHO 48-49 (1979).

99. See, e.g., Kadish, *supra* note 84; Monahan, *supra* note 84.

100. State v. Rawlands, 294 Minn. 17, 32, 199 N.W.2d 774, 788 (1972), see *supra* note 1 and accompanying text.

101. T. SZASZ, LAW, LIBERTY AND PSYCHIATRY, *supra* note 76.

102. See Slovenko & Luby, *On the Emancipation of Mental Patients*, 3 J. PSYCHIATRY & L. 191, 194 (1975).

disturbed patient might respond to treatment within a short time and be safely discharged.¹⁰³ Mental hospitals, therefore, were able to reduce their populations drastically.

At the same time changing legal standards have made the involuntary commitment and institutionalization of mentally ill persons more difficult.¹⁰⁴ This fact is critical because those found not guilty by reason of mental illness undergo the same civil commitment procedure as those who have not committed a crime. By enacting the Community Mental Health Centers Act in 1963,¹⁰⁵ Congress offered substantial inducements for states to reduce the number of institutionalized patients. Minnesota revised its commitment procedure in 1967.¹⁰⁶ Under the revised procedure, a person could be involuntarily committed as mentally ill if he had a "psychiatric or other disorder which substantially [impaired] his mental health and [was] in need of treatment or supervision."¹⁰⁷ The 1967 Minnesota statute also provided for commitment as "mentally ill and dangerous" although the criteria for dangerousness were not defined.¹⁰⁸ The legislature established the Special Review Board in 1971 to review mentally ill and dangerous patients who desired to transfer from the Minnesota Security Hospital.¹⁰⁹ A more drastic change was made in 1974 when an amendment to the standard for involuntary commitment required

- (1) that the evidence of the proposed patient's conduct clearly shows that his customary self-control, judgment, and discretion in the conduct of his affairs and social relations is lessened to such an extent that hospitalization is necessary for his own wel-

103. See Wright, *Problems in Administering the Insanity Defense* in REPORT OF GOVERNOR HUGH L. CAREY, *supra* note 88, at 114-15.

104. See *infra* notes 105-16 and accompanying text. An internal study done for the Department of Public Welfare noted that the average daily mentally ill resident population declined by 80% over the period from 1962 to 1977. The study noted that the decline in patient population was due in part to "the enactment of state and federal laws pertaining to . . . [the] protection of patients' rights." See RESIDENTIAL CARE IN MINNESOTA 2 (1977) (on file at the William Mitchell Law Review office).

105. Pub. L. 88-164 Title II; 77 Stat. 290 (1963) (current version at 42 U.S.C. §§ 2689-2689aa (1981)). For a recent critical review of this act, see Wickenden, *Mental Health's Malady*, NEW REPUBLIC, Aug. 15, 1981, at 19.

106. Minnesota Hospitalization and Commitment Act, ch. 638, 1967 Minn. Laws 1294 (current version at MINN. STAT. §§ 253A.01-.21 (1980)).

107. *Id.* § 2(3), 1967 Minn. Laws at 1295 (current version at MINN. STAT. § 253A.02(3) (1980)).

108. See *id.* § 7(17)(c), 1967 Minn. Laws at 1302 (current version at MINN. STAT. § 253A.07(17)(c) (1980)).

109. See Act of May 13, 1971, ch. 262, §§ 9, 10, 12, 1971 Minn. Laws 470, 472-73, 475 (codified at MINN. STAT. §§ 253A.15(2)(a), .16(1), .16(5) (1980)).

fare or the protection of society; that is, that the evidence of his conduct clearly shows: (i) that he has attempted to or threatened to take his own life or attempted to seriously physically harm himself or others; or (ii) that he has failed to protect himself from exploitation from others; or (iii) that he has failed to care for his own needs for food, clothing, shelter, safety or medical care; and (2) after careful consideration of reasonable alternative dispositions, including but not limited to, dismissal of petition, out-patient care, informal or voluntary hospitalization in a private or public facility, appointment of a guardian or release before commitment as provided for in Minnesota Statutes, Section 253A.12, and finds no suitable alternative to involuntary hospitalization.¹¹⁰

Similar strict standards were enacted in 1975 for commitment of mentally deficient persons.¹¹¹ The Minnesota Commitment Act of 1982 retains the standards set in 1974 and 1975 for involuntary commitment.¹¹²

Court decisions have promulgated increasingly problematic standards regarding involuntary commitments. In 1975, the United States Supreme Court held that overtly dangerous behavior was necessary to support an involuntary commitment.¹¹³ A more recent Minnesota decision requires a probable cause hearing within seventy-two hours of an involuntary hold.¹¹⁴ Finally, pursuant to a settlement agreed upon by Hennepin County in a federal district court, the cases of those involuntarily committed must be reviewed on an annual basis.¹¹⁵

This medical, legislative and judicial activity has made it more difficult to involuntarily commit people and keep them confined. Perhaps this trend is desirable, but remember that these same benefits must be afforded to any person who violates the criminal code and is acquitted because of a successful mental illness defense. If a

110. Act of Apr. 11, 1974, ch. 482, § 4, 1974 Minn. Laws 1209, 1210 (codified at MINN. STAT. § 253A.07(17)(a) (1980)).

111. Act of June 2, 1975, ch. 208, 1975 Minn. Laws 612 (codified at MINN. STAT. §§ 252A.01-.21, 253A.07(17)(b) (1980)).

112. Minnesota Commitment Act of 1982, ch. 581, §§ 2, 9, 1982 Minn. Sess. Law Serv. 1286, 1287-88, 1296 (West) (to be codified at MINN. STAT. §§ 253B.02(13), .09(1)). Section 253B.09(1) requires the court to find that "by clear and convincing evidence that the proposed patient is a mentally ill" person and "that there is no suitable alternative to judicial commitment." Section 253B.02(13) defines "mentally ill person" to include those behaviors previously enumerated in MINN. STAT. § 253A.07, subd. 17(a) (1980).

113. See *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975).

114. See *State ex rel. Doe v. Madonna*, 295 N.W.2d 356, 365 (Minn. 1980).

115. See *Vickerman v. Hennepin County Probate Court*, No. 4-78 Civ. 376 (D. Minn. Dec. 29, 1980).

defendant is found not guilty by reason of insanity, constitutional standards prohibit his restraint on a basis unequal to other civilly committed persons.¹¹⁶ Therefore, if society wishes to more effectively restrain those who violate the law but are mentally ill, the mental illness defense must be restricted or eliminated.

Predictably, more defendants avail themselves of the insanity defense because success no longer leads to long-term confinement in mental institutions.¹¹⁷ The increased use of the defense together with its use in widely publicized trials have led to increased criticism of the defense.¹¹⁸

B. Fair Treatment of the Mentally Ill Defendant

The foregoing discussion demonstrates the advantages of the insanity defense for those with symptoms of mental illness. The defense also has characteristics that handicap those who avail themselves of it. Alexander and Staub¹¹⁹ describe two types of criminals: normal and neurotic. For the normal criminal, the traditional punishment of retributive incarceration is acceptable. If the criminal is neurotic, punishment is inappropriate. Instead, the criminal should "be turned over to a special agency for psychoanalytically minded reëducation, or to a psychoanalyst for treatment."¹²⁰

The premise for this "reëducation" or "treatment" is as follows:

We propose a more consistent application of the principle *that not the deed but the doer should be punished* The implementation of this principle requires *expert diagnostic judgment* which can be expected only from *specially trained psychiatric experts*. Before any sentence is imposed, *a medical-legal diagnosis should be required* The neurotic criminal obviously has a *limited sense of responsibility*. Primarily, he is a *sick person*, and his *delinquency is the outcome of his emotional disturbances*. This fact, however, should not exempt him from the consequences of his action. *If he is curable, he should be incarcerated for the duration of psychiatric treatment*

116. See *supra* notes 38-48 and accompanying text.

117. In the State of New York only 53 persons were found not guilty by reason of insanity from mid-1965 until mid-1971. See Steadman, Pasewark & Pantle, *The Use of the Insanity Defense* in REPORT TO GOVERNOR HUGH L. CAREY, *supra* note 88, at 40. This figure increased over four-fold, to 225, during the five-year period of mid-1971 until mid-1976. *Id.* at 53.

118. See *supra* note 80 and accompanying text.

119. F. ALEXANDER & H. STAUB, *THE CRIMINAL, THE JUDGE AND THE PUBLIC: A PSYCHOLOGICAL ANALYSIS* (1956).

120. *Id.* at 210 (emphasis in original).

so long as he still represents a menace to society. If he is incurable, *he belongs in a hospital for incurables for life*.¹²¹

Bernard Diamond, an eminent forensic psychiatrist essentially concurs with the Alexander and Staub analysis. Diamond considers the entry of psychiatry into the courtroom to be the sacred mission of psychiatry.¹²²

This concept of the "Therapeutic State" conflicts with civil libertarian philosophy. Not surprisingly, the Soviet Union uses indeterminate confinement in mental institutions as a common method to control both criminals and dissidents. The concept presupposes that the "normal" can be distinguished from the "neurotic." Rather than punish the offender, the Therapeutic State redefines him. Once it has labeled an offender as "sick," "insane" or "mentally ill," the state can more freely impose coercive "treatment" for the offender's own good. The offender is adjudicated not for what he has done but what he is. He is held not because that is his just desert, but because of his status. He is discharged not because his punishment has been insufficient, but because his status has been redefined by the experts.¹²³

What if, because of insanity, the defendant is incapable of possessing the essential element of intent for the crime charged? Generally, such defendants are found not guilty because of insanity or mental illness.¹²⁴ This finding seldom results in a complete release. Instead, the defendant is committed, either automatically or by a separate proceeding, to a mental institution for an indeterminate period of time. Indeed, an essential function of the insanity verdict is to incarcerate those who are not guilty of any crime due to their lack of criminal intent.¹²⁵ Just as the guilty verdict labels an individual as "bad," the not guilty verdict is intended to avoid that label and to provide exoneration. The not-guilty-by-reason-of-mental-illness verdict provides no exoneration. Instead, it imposes the label "mad and bad."¹²⁶ This double stigma can be avoided only by abolishing the defense. The focus should be on the ability of the accused to possess the required criminal intent. If he lacked that ability, then the verdict should be not guilty. The

121. *Id.* at xii-xiii (emphasis added).

122. Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59 (1961).

123. See generally T. SZASZ, LAW, LIBERTY AND PSYCHIATRY, *supra* note 76, at 123-48.

124. See Goldstein & Katz, *supra* note 79, at 864-68.

125. See *id.* at 864-66.

126. See Morris, *supra* note 78, at 524-26.

defendant is entitled to and should be granted the complete exoneration concomitant with that verdict.

Discriminatory application appears as another serious shortcoming of the mental illness defense. The defense is particularly susceptible to advantageous use by upper and upper middle-class offenders. Despite the authoritarian nature of the Therapeutic State, recent legislative and judicial actions have lessened the threat to civil liberties posed by indefinite commitment.¹²⁷ Upper class defendants are especially able to take advantage of this paradox. An educated and articulate individual is more likely to convince a psychiatrist that he manifests a mental disorder and is susceptible to treatment. A defendant from an upper-class family is able to afford the battery of distinguished experts necessary to persuade the decisionmakers in the criminal justice system that psychiatric diversion is appropriate. Indeed, the possibility of protracted litigation involving a seemingly endless parade of highly qualified mental health experts is sufficient to intimidate many harried prosecutors into agreement with defense proposed dispositions. Such dispositions normally involve inpatient treatment. Again, the middle and upper classes benefit from their ability to afford private hospitalization. Finally, the same psychiatric experts who assisted the patient in avoiding penal sanctions can be marshalled to ensure release from the hospital at the earliest opportunity.

Contrast these circumstances with those facing the lower income person suffering from a mental disorder. His public defender has difficulty justifying the time and effort needed to prepare the defense. The defendant's only expert will be a state psychiatrist employed at a public mental institution. Both low intelligence and educational skills might impede the defendant's ability to communicate and describe his thought processes. If the defendant successfully avoids penal sanctions, his place of commitment will be a state institution. There, the length of his stay remains entirely at the mercy of the staff.

A recent New York study of patients who successfully asserted the insanity defense demonstrated four subgroups in the patient population. The subgroups were (1) mothers who killed a family member, (2) police officers, (3) persons with whom the public could empathize (defined as the "I-can-feel-sorry-for-you" sub-

127. See *supra* notes 101-16 and accompanying text.

group), and (4) persons of "respectability."¹²⁸ None of these subgroups are representative of the masses that pass through the criminal justice system. Each, however, possesses qualities particularly useful for the successful assertion of the mental illness defense. These qualities are also useful in obtaining early release from a mental institution.

The Patricia Hearst case presents an extreme example of the disparate application of the insanity defense. Dr. Louis J. West, chairman of the Department of Psychiatry at the University of California at Los Angeles, wrote to the Hearst family advising them that "powerful legal and medical arguments can be mobilized in [their daughter's] defense."¹²⁹ The letter was unsolicited and written *before* Hearst was captured. Dr. West was, of course, recruited and testified for Hearst's defense. When questioned concerning his letter and the possibility that it demonstrated bias, West replied that he wrote to the family "as one parent to another."¹³⁰ As Dr. Szasz acidly remarked, the fact "that the Hearsts are rich and powerful obviously had nothing to do with it."¹³¹

The mental illness defense also discriminates in the manner in which it relates to the concept of free will. By characterizing the insane as lacking the ability to choose "freely to do the wrong,"¹³² the law presumes that the rest of mankind possesses a free will and is blameworthy. If psychiatry can excuse a defendant from his otherwise criminal acts, why not permit the sociologists to construct a defense for the grossly deprived? Certainly a life of abject poverty circumscribes freedom of choice as effectively as mental illness. Evidence of mental illness should receive the same consideration as many other conditions which affect a defendant's motivation. Drunkenness, stupidity, hunger and physical handicaps should all be relevant for the limited purpose of educating the factfinder about the existence of criminal intent.¹³³

Because abolition of the mental illness defense will restrict the use of psychiatric testimony and result in more convictions, how does abolition provide fairer treatment for the accused? Abolition puts the mentally ill on the same footing as the rest of society by requiring all persons to be responsible for their acts if they possess

128. See Steadman, Pasewark & Pantle, *supra* note 117, at 68-71.

129. Szasz, *supra* note 80, at 10.

130. *Id.* at 11.

131. *Id.*

132. See *supra* note 1 and accompanying text.

133. See S. HALLECK, *supra* note 77, at 205-29; Morris, *supra* note 78, at 518-20.

the required criminal intent. Indeed, one of the first tasks of a treating psychiatrist is to impress the mentally ill patient with the fact that he *is* responsible for his actions.¹³⁴ To deprive a person of the notion that he is a free, responsible individual is to separate that person from his peers. To insist upon his responsibility is to restore his humanity.

C. *The Administration of the Criminal Justice System*

Few areas of the substantive criminal law have evoked as much comment and criticism as the insanity defense. The published debate over which insanity standard is best has denuded forests. One standard—*Durham*¹³⁵—was proposed with wild enthusiasm in 1954, only to be abandoned within eighteen years.¹³⁶ The states are still sharply divided between those who have adopted the ALI test¹³⁷ and those who cling to *M'Naghten*.¹³⁸ Seven states have recently enacted the "guilty-but-mentally-ill" verdict.¹³⁹ President Reagan who had proposed federal reform which appears to parallel this new verdict has changed his position to support the type of reform advocated by this paper.¹⁴⁰ Meanwhile, a growing dissatisfaction among the public appears evident.¹⁴¹ Despite of all the debate over which test or standard is most appropriate, studies suggest that juries do not distinguish them.¹⁴²

One of the causes of this concern and uncertainty lies in the attitude of the psychiatric profession. If psychiatrists could reach a consensus regarding their role in the courtroom, a natural deference to their expertise might develop. This has not occurred. When such eminent psychiatrists as Szasz and Diamond cannot even agree on whether mental illness exists¹⁴³—to say nothing of

134. See S. HALLECK, *supra* note 77, at 205-29; Allen, *supra* note 84, at 514, 518-20.

135. *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954); see *supra* notes 12-16 and accompanying text.

136. *United States v. Brawner*, 471 F.2d 969, 981 (D.C. Cir. 1972); see Note, *supra* note 5, at notes 42-46 and accompanying text.

137. See Note, *supra* note 5, at note 48 and accompanying text.

138. See *id.* at notes 18-19 and accompanying text.

139. See *infra* notes 196-211 and accompanying text.

140. Compare The Crime Control Act of 1982, S. 2903, 92d Cong., 2d Sess. § 101, Cong. Rec. S11404 (daily ed. Sept. 14, 1982), with ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, U.S. DEP'T JUSTICE, FINAL REPORT 54 (1981).

141. See *supra* notes 80 & 118 and accompanying text.

142. M. GUTTMACHER, THE ROLE OF PSYCHIATRY IN LAW 17-18 (1968).

143. See Robitscher, *The Impact of New Legal Standards on Psychiatry or Who Are David Bazelon and Thomas Szasz and Why Are They Saying Such Terrible Things About Us or Authoritarianism Versus Nihilism in Legal Psychiatry*, 1975 J. PSYCHIATRY & L. 151.

its definition—attorneys and policymakers are left in a quandary.

Although attorneys, judges and members of the general public often criticize the psychiatric profession for its uncertainty, the sharpest barbs come from within its own ranks. Dr. Joel Fort has consulted or testified in over 300 criminal cases during a thirty-year period. Nevertheless, he has no desire to claim the role of an “expert” for himself or any other psychiatrist.

No standards of relevant training and experience have ever been established for experts on criminal responsibility. Those who pose as experts in courtrooms often know nothing about the issues in question. . . . [P]sychiatry dominates, due to self-aggrandizement by the profession and judicial ignorance.¹⁴⁴

Fort is especially concerned about the lack of objectivity characteristic of his colleagues.

Most psychiatric “experts” testify only for the defense. Many seem to assume that murderers and other serious criminals should be hospitalized for “rehabilitation,” not imprisoned for their crimes. The courtroom behaviorists seem relatively unconcerned about the victims, their families or the protection of society in general.¹⁴⁵

Fort advocates “specific standards of training and experience for experts before they are allowed to testify.”¹⁴⁶

Dr. Lawrence C. Kolb, a forensic psychiatrist and past president of the American Psychiatric Association, also has doubts concerning the expertise of his profession.

I am convinced that the competence of the specialty is exceeded by much of current practice. Psychiatric examinations are made after the fact. It is beyond the capacity of a psychiatrist to comprehend the defendant’s capacity to define the rightness or wrongness of his action taken at the time the act was committed. . . . [P]sychiatrists answering such questions are forced almost to the verge of unethical behavior—forced by the instance of legal procedures derived from a 19th century conception of the psychology of man

. . . .

The acceptance by the specialty of psychiatry of the adversarial position, with often competing testimony given by several members of the same specialty, damages the public respect due

144. Fort, *Doubts About Courtroom Experts*, 7 HUM. BEHAV. 70 (Dec. 1978).

145. *Id.*

146. *Id.*

to the specialty.¹⁴⁷

Kolb suggests that the "single place" for the psychiatrist in the courtroom is to assist the judge in making an effective disposition after guilt has been determined.¹⁴⁸

Psychiatry is especially vulnerable to public ridicule when its leading authorities find themselves in vehement disagreement in high profile trials such as those of Sirhan Sirhan,¹⁴⁹ Patricia Hearst,¹⁵⁰ John Hinckley, Jr.,¹⁵¹ and Ming Sen Shiue.¹⁵² Of equal concern is the misallocation of resources that such trials cause. In 1977 Dr. Seymour Pollack estimated that one million court related consultations occur each year.¹⁵³ Thankfully, few are as extensive as those relating to the Hearst case. The talent and money spent on consultations and lengthy trials would be better used if channeled into the care and treatment of the patients in the state hospitals.

Abolition of the insanity defense would not eliminate psychiatric testimony from the courtroom. As noted previously, a defendant has the right to introduce evidence indicating that a mental disorder robbed him of the capacity to form the criminal intent essential to the commission of the crime.¹⁵⁴ Abolition should, however, decrease the quantity and increase the quality of psychiatric testimony. The psychiatrist would be limited to testimony on the defendant's capacity to intend to commit a particular act. The psychiatrist would be permitted

to describe the defendant's mental condition and symptoms, his pathological beliefs and motivations, if he was thus afflicted, and to explain how these influenced or would have influenced

147. Kolb, *Reflections on the Insanity Defense*, in REPORT TO GOVERNOR HUGH L. CAREY, *supra* note 88, at 101-03.

148. *Id.* at 103.

149. On June 5, 1968, in the Los Angeles Ambassador Motel, Sirhan Sirhan shot and killed Robert Kennedy. See J. NASH, *supra* note 98, at 504.

150. See *supra* notes 129-31 and accompanying text.

151. John Hinckley, Jr. was found not guilty by reason of insanity for attempting to assassinate President Reagan, and other crimes. Some commentators stated that the Hinckley trial exemplified how psychiatry can make "insanity trials expensive circuses." See Jost, *No Rush to Understanding*, L.A. Daily J., June 28, 1982, at 2, col. 5.

152. Shiue was convicted of kidnapping a former school teacher of his. See *United States v. Shiue*, 508 F. Supp. 455, 460 (D. Minn. 1980), *aff'd*, 650 F.2d 919, 924 (8th Cir. 1981). On February 21, 1981, a state jury also found Shiue guilty of second degree murder and kidnapping. See *State v. Shiue*, File No. F4990 (Minn. 10th Dist. Ct. Mar. 9, 1981), *aff'd*, 326 N.W.2d 648 (Minn. 1982).

153. Robitscher & Williams, *Should Psychiatrists Get Out of the Courtroom?*, 11 PSYCHOLOGY TODAY 84, 85 (1977).

154. See *supra* notes 49-57 and accompanying text.

his behavior, particularly his mental capacity *knowingly* [to commit the crime charged].¹⁵⁵

This testimony is clearly within the expertise of a forensic psychiatrist. Psychiatrists are more likely than not to agree on a particular diagnosis and describe how a particular disorder affected the individual's mental process. What they are not able to agree upon is whether a person knew right from wrong. Abolition of the insanity defense eliminates the need for that opinion.

V. OBJECTIONS TO ABOLITION AND OTHER ALTERNATIVES

Although abolishing the insanity defense has advantages, significant issues must be resolved before taking that step. The concept of blameworthiness is central to the defense and may have constitutional status.¹⁵⁶ Proponents of the insanity defense contend that its abolition will lead criminal law into the morass of the concept of "diminished capacity."¹⁵⁷ Three states have invented the "guilty-but-mentally-ill" verdict which, some argue, obviates the need for complete abolition.¹⁵⁸ The remainder of this article will discuss these issues.

A. Blameworthiness and the Constitution

The *Durham* court made the point quite succinctly: "Our collective conscience does not allow punishment where it cannot impose blame."¹⁵⁹ If a mental disorder has robbed a person of his free will, how can society convict that person? When society finds it expedient to convict the morally innocent, the distinction between good and evil is blurred. Society needs this distinction for symbolic purposes. The criminal trial is, the argument goes, a morality play with a full gallery of citizen spectators.¹⁶⁰

The concept of blame, or *mens rea*, however, has always had a broader purpose than invalidating the insanity defense. The requirement of criminal intent would survive the elimination of the

155. *Rhodes v. United States*, 282 F.2d 59, 62 (4th Cir. 1960); accord *Carnahan, Legal Perspectives on the Insanity Defense*, in REPORT TO GOVERNOR HUGH L. CAREY, *supra* note 88, at 24-25.

156. See *infra* notes 159-82 and accompanying text.

157. See *infra* notes 183-95 and accompanying text.

158. See *infra* notes 196-211 and accompanying text.

159. *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954) (quoting *Holloway v. United States*, 148 F.2d 665, 667 (D.C. Cir. 1945)). The *Durham* court stated that juries will continue to make moral judgments in these cases, believing that if no blame can be imposed on an individual, neither should punishment. *Id.*

160. See *Monahan, supra* note 84, at 721.

insanity plea. Mens rea would live on.¹⁶¹ The requirement of criminal intent would continue to exonerate a person who accidentally caused the death of someone else. The same result would occur if a person literally did not know what he was doing when he struck the fatal blow. Such a defendant has no need for *M'Naghten* or any other insanity test. He lacks the mens rea required by the legislative definition of the crime.

Some commentators have criticized the abolitionist view, stating correctly that "[y]ou can change the name of the game, but you cannot avoid playing it so long as mens rea is required."¹⁶² This simply illustrates that abolishing the defense is not the act of a butcher, using a meat axe to hack away at basic legal concepts. Instead, it is a modest excision—the removal of an area of law which has outlived its usefulness.

The insanity defense once had arguably necessary objectives. When the defense was created, the death penalty for numerous offenses was more than an empty threat.¹⁶³ The history of criminal law is replete with legal fictions and rigid pleading requirements designed to mitigate the law's cruelty. The insanity defense softened the law's rigid requirements. Now, post-conviction dispositions are sufficiently flexible and humane to permit society to retire the insanity defense.¹⁶⁴

A less frequently stated goal of the defense is to retain jurisdiction over a person who has not committed a crime.¹⁶⁵ By defining it as an all-or-nothing defense, courts have precluded testimony of mental disorder affecting intent—even though intent is an essential element of the offense charged.¹⁶⁶ When a person has a gross mental disorder and is so deranged that he is unaware of what he is doing, the prosecution cannot prove criminal intent. Although an acquittal deprives the state of jurisdiction over the same person,

161. Some would do away entirely with mens rea until the dispositional hearing. See, e.g., B. WOOTEN, *supra* note 77, at 47-90.

162. See Kadish, *supra* note 84, at 282.

163. "Capital punishment is not an essential element in the original definition [of felony], but was for long so closely associated with felony that until 1827, if a statute made a new offense felony, the law implied that it should be punished not merely by forfeiture but also by death . . ." 1 RUSSELL ON CRIME 4 (Turner 12th ed. 1964).

Until the end of the nineteenth century, deterrence was seen as the primary purpose for punishment of criminals. Because death was the ultimate deterrent, it was the preferred penalty. See P. FITZGERALD, CRIMINAL LAW AND PUNISHMENT 207-08 (1962).

164. See Kadish *supra* note 84.

165. See Goldstein & Katz, *supra* note 79, at 864-69.

166. See *supra* notes 49-57 and accompanying text.

the same is not true of the not-guilty-by-reason-of-insanity verdict. In fact, in the days of automatic commitment, a person could be incarcerated for life even if the crime charged was relatively minor.¹⁶⁷ The demise of the automatic commitment and the advent of reform of the law concerning the mentally ill has made long-term retention of jurisdiction unacceptable.

Thus, the more pragmatic goals of the insanity defense, avoidance of the death penalty and retention of jurisdiction over those not guilty, no longer apply. Defenders argue that the concept of blameworthiness underscores the public's need for at least the perception of responsibility.¹⁶⁸ The insanity defense can subvert that goal. Although acquittals by reason of insanity might be few, the public increasingly views the defense as a means to avoid responsibility. The defense is ineffective for building a perception of responsibility amongst the citizenry.

Minnesota has recently reviewed the goals and objectives of its criminal sanctions. In 1978 the legislature created the Sentencing Guidelines Commission and required that commission to draft advisory guidelines for judges.¹⁶⁹ The sentences were to be determinate and based upon reasonable offense and offender characteristics.¹⁷⁰ In its 1980 report the commission adopted a clear objective for making sentencing decisions: the offender is to be given his just, commensurate deserts.¹⁷¹ Minnesota should abolish the insanity defense only if its abolition is consistent with a just-deserts sentencing philosophy.

Is it just to blame or convict an offender who is mentally ill? To address that question, we must first exclude those incompetent to stand trial. Second, we must exclude those so grossly mentally ill that they are incapable of forming the intent required by the definition of the crime. Thus we have used the ancient concept of mens rea to divert those whose lack of blame is self-evident. We are left with intentional wrongdoers who, because of mental disorder, cannot know their conduct is wrong.

Minnesota's sentencing guidelines can accommodate these types of convicted persons. Although prison incarceration is mandatory

167. See T. SZASZ, *LAW, LIBERTY AND PSYCHIATRY*, *supra* note 76, at 123-37, 228-29.

168. See *supra* note 80 and accompanying text.

169. Act of Apr. 5, 1978, ch. 723, § 9, 1978 Minn. Laws 761, 765-66 (codified at MINN. STAT. § 244.09(5) (1980)).

170. *Id.* (codified at MINN. STAT. § 244.09, subd. 5(2) (1980)).

171. MINNESOTA SENTENCING GUIDELINES COMM'N, MINNESOTA SENTENCING GUIDELINES & COMMENTARY art. I (1980).

for serious crimes against persons, the sentencing judge may depart from the prison sentence if the "offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed."¹⁷² If the sentence is stayed, the judge may put the offender on probation subject to conditions which take into account the offender's mental disorder.¹⁷³ Even if the mentally ill offender is sent to prison, the Commissioner of Corrections has authority to temporarily transfer the prisoner to the Security Hospital.¹⁷⁴

Thus, the issue must be stated more narrowly: Is it just to blame (convict) a mentally ill person who has intentionally committed a criminal act where dispositional alternatives substantially similar to those for the non-criminal mentally ill are available? Or, to paraphrase *Durham*, "Does our collective conscience allow us to impose blame?" This question, as is true of the entire insanity issue, is subjective. As Goldstein and Katz noted,

The court leaves without definition and without identification of purpose such ambiguous words as "punishment" and "blame" and thus in effect only says "he who is punishable is blameworthy and he who is blameworthy is punishable."¹⁷⁵

Given the vague standards of the insanity defense, its arbitrary application, its administrative pitfalls and its inability to provide security to the public, labeling intentional wrongdoing by a mentally ill person as criminal and dealing with his particular malady within the context of that criminal conviction is just.

Some argue that the concept of insanity has become so intertwined with blameworthiness and mens rea that it has achieved constitutional stature.¹⁷⁶ As shown above, however, abolition of the defense leaves mens rea untouched. Two state courts have overturned legislative attempts to abolish the insanity defense on state constitutional grounds: Washington in 1910¹⁷⁷ and Mississippi in 1931.¹⁷⁸ Both statutes did more than abolish the plea; both statutes prohibited the admission of evidence of mental disorder.¹⁷⁹

172. *Id.* art. II.D.103.

173. MINN. STAT. § 609.135 (1980) (dealing with stay and imposition or execution of sentences).

174. *Id.* §§ 241.07, .69(3) (1980).

175. Goldstein & Katz, *supra* note 79, at 860.

176. *See, e.g.*, Wales, *supra* note 84, at 702-04.

177. *See* State v. Strasburg, 60 Wash. 106, 119, 110 P. 1020, 1024 (1910).

178. *See* Sinclair v. State, 161 Miss. 142, 153-54, 132 So. 581, 582 (1931) (*per curiam*).

179. Act of Apr. 3, 1928, ch. 75, 1928 Miss. Laws 92; Act of Mar. 22, 1909, ch. 249, § 7, 1909 Wash. Sess. Laws 890, 891-92.

This prohibition particularly impressed the Washington court.

To take from the accused the opportunity to offer evidence tending to prove this fact is in our opinion as much a violation of his constitutional right of trial by jury as to take from him the right to offer evidence before the jury tending to show that he did not physically commit the act¹⁸⁰

Contemporary defense attorneys who might rely on those two cases would be hard pressed to find other state court decisions over fifty years old for which they show so much respect. More compelling are the words of the United States Supreme Court in *Powell v. Texas*:¹⁸¹

[T]his Court has never articulated a general constitutional doctrine of *mens rea*.

. . . The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

. . . [F]ormulating a constitutional rule would reduce, if not eliminate, the fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.¹⁸²

As long as the evidence of mental disorder is admissible to negate intent and the court retains its healthy deference to the legislature in policy matters, abolition of the defense of mental illness is not constitutionally offensive.

B. Diminished Capacity

By focusing on the issue of intent, the proposal suggested by this article incorporates the doctrine sometimes referred to as "diminished capacity." Evidence of mental disorder is admissible to determine if the defendant's capacity to form the requisite criminal intent has been diminished. The California case of *People v.*

180. *State v. Strasburg*, 60 Wash. 106, 119, 110 P. 1020, 1024 (1910).

181. 392 U.S. 514 (1968).

182. *Id.* at 535-37 (footnotes omitted).

*Wells*¹⁸³ was one of the first decisions to clearly express the concept, reversing a murder conviction because the trial court prevented the defendant from trying to prove the absence of malice aforethought. *Wells* conservatively limited the defense to proof relating directly to the specifically required state of mind.¹⁸⁴ Unfortunately, the court broadened the concept ten years later in *People v. Gorshen*¹⁸⁵ by permitting the defense to introduce any evidence which tended to show that the defendant's capacity had been reduced. This expansion continued in *People v. Wolff*¹⁸⁶ which allowed testimony of the defendant's capacity to *evaluate* what he was doing.¹⁸⁷ Thus, California has adopted a subjective diminished responsibility standard which cannot be applied consistently because it lacks objective criteria.¹⁸⁸

The California experience can and should be avoided. Minnesota's statute should be amended to state that it is a "defense . . . that the defendant, as a result of mental illness or mental deficiency, lacked the *criminal intent*, as defined by Section 609.02, Subdivision 9, required as an *element of the offense charged*." This language would put the courts on notice that the legislature intends to restrict evidence of mental illness to that relating to the criminal intent which is an element of the offense charged.

Minnesota already permits juries to consider diminished capacity due to intoxication.¹⁸⁹ Getting drunk is a voluntary act. For the law to lessen criminal responsibility for a drunk but to deny a similar opportunity to a mentally ill person is incongruous at best.

Even without legislative change, diminished capacity is undoubtedly the law in Minnesota. A trial court could not constitutionally exclude psychiatric testimony that negates criminal intent.

183. 33 Cal. 2d 330, 202 P.2d 53, *cert. denied*, 338 U.S. 836 (1949), *overruled in part*, *People v. Wetmore*, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978) (no distinction between evidence which tends to prove insanity and evidence probative of diminished capacity).

184. *Id.* at 356-57, 202 P.2d at 69.

185. 51 Cal. 2d 716, 336 P.2d 492 (1959), *overruled in part*, *People v. Wetmore*, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978).

186. 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

187. *Id.* at 808-09, 394 P.2d at 967-68, 40 Cal. Rptr. at 279-80.

188. See Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 844-45 (1977).

189. MINN. STAT. § 609.075 (1980) provides:

An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind.

A series of Wisconsin cases had barred such testimony in the first half of the bifurcated trial.¹⁹⁰ The Seventh Circuit Court of Appeals declared that "[t]he exclusion of psychiatric evidence offered to show that the petitioner lacked the capacity to form specific intent to kill the two victims, is, by itself, constitutionally infirm."¹⁹¹ The Wisconsin Supreme Court obliged by overruling its past decisions.¹⁹² Other state courts have reached the same conclusion.¹⁹³ Minnesota should recognize the constitutional inevitability of the concept of diminished capacity and draft legislation which avoids the subjectivity of the California interpretation.

The framers of Minnesota's bifurcated trial procedure apparently did not appreciate the problematic effect of diminished capacity. The purpose of the bifurcated trial is to exclude damaging psychiatric testimony during the "guilt" phase of the trial. The accused, however, might want the jury to hear psychiatric testimony if it may lead to a lesser included suspended conviction. During the second stage the defense will introduce similar psychiatric testimony to obtain a not guilty verdict. Not only is the testimony redundant but it allows the defense two chances to avoid responsibility on the same basis. Several state courts resolved this problem by declaring the bifurcation procedure unconstitutional.¹⁹⁴ Minnesota should abandon the bifurcated procedure even if it retains the insanity defense.¹⁹⁵

190. See, e.g., *Hughes v. State*, 68 Wis. 2d 159, 163-65, 227 N.W.2d 911, 913-14 (1975), *overruled in part*, *Schimmel v. State*, 84 Wis. 2d 287, 302, 267 N.W.2d 271, 278 (1978) (psychiatric testimony going to defendant's mental capacity admissible in first phase of bifurcated trial); see also *Hughes v. Mathews*, 576 F.2d 1250, 1255 (7th Cir.) (exclusionary rule held unconstitutional as applied to first degree murder prosecution to which defendant has pleaded not guilty), *cert. dismissed*, 439 U.S. 801 (1978).

191. *Hughes v. Mathews*, 576 F.2d 1250, 1255 (7th Cir.), *cert. dismissed*, 439 U.S. 801 (1978).

192. *Schimmel v. State*, 84 Wis. 2d 287, 302, 267 N.W.2d 271, 278 (1978), *overruled in part*, *Steele v. State*, 97 Wis. 2d 72, 98-99, 294 N.W.2d 2, 14 (1980) (competent psychiatric evidence relevant to defendant's mental state at time of crime is inadmissible).

193. See, e.g., *State v. Shaw*, 106 Ariz. 103, 113, 471 P.2d 715, 725 (1970); *State ex rel. Boyd v. Green*, 355 So. 2d 789, 792-93 (Fla. 1978); *Sanchez v. State*, 567 P.2d 270, 280 (Wyo. 1977). A 1940 decision to the contrary, *Fisher v. United States*, 328 U.S. 463 (1946), probably does not survive *In re Winship*, 397 U.S. 358 (1970). See Comment, *Mens Rea and Insanity*, 28 ME. L. REV. 500, 528 (1976). For an opposing view, see H. HUCKABEE, LAWYERS, PSYCHIATRISTS AND CRIMINAL LAW 30-100 (1980). Huckabee, a federal prosecutor, is so dismayed with the California interpretation of diminished capacity that he argues for the retention of the insanity defense.

194. See *State v. Shaw*, 106 Ariz. 103, 113, 471 P.2d 715, 725 (1970); *State ex rel. Boyd v. Green*, 355 So. 2d 789, 792-93 (Fla. 1978); *Sanchez v. State*, 567 P.2d 270, 280 (Wyo. 1977).

195. See generally Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CALIF.

C. *The Guilty-But-Mentally-Ill Verdict*

Minnesota should not follow the example of Michigan and the other states that have enacted a guilty-but-mentally-ill verdict alternative. Before enacting this verdict, Michigan, like most states, provided for an automatic commitment for those found not guilty by reason of insanity. Following prevailing constitutional standards,¹⁹⁶ the Michigan Supreme Court declared the procedure unconstitutional in *People v. McQuillan*.¹⁹⁷ The court required the state to provide civil commitment hearings for all persons then held by virtue of insanity acquittals. Apparently several of the subsequently released acquittees committed serious, well-publicized crimes. The legislature responded immediately by creating the guilty-but-mentally-ill verdict in 1975.¹⁹⁸ Because a recipient of that verdict is pronounced guilty of a crime, the court can order confinement for at least the duration of the maximum term of the offense of conviction. More recently, Indiana,¹⁹⁹ Illinois,²⁰⁰ Connecticut,²⁰¹ Georgia,²⁰² Kentucky,²⁰³ and New Mexico²⁰⁴ have enacted substantially similar legislation.

None of these states amended or altered the standard regarding the not-guilty-by-reason-of-insanity verdict. Theoretically, the number of offenders entitled to that verdict remains constant: the offenders who receive the guilty-but-mentally-ill verdict would have been found guilty under previous law. Thus, the new verdict utterly fails that purpose for which it was developed because it does not affect defendants acquitted by reason of insanity.

The legislators of these seven states are presumably more astute than to enact a law which completely fails of its purpose. Although the new verdict does not change the standard for an in-

L. REV. 805 (1961); Comment, *The Gradual Decay of the Bifurcated Trial System in California and the Emergence of "Partial Insanity: 1966,"* 3 CAL. W.L. REV. 149 (1967).

196. See *Bolton v. Harris*, 395 F.2d 642, 647 (D.C. Cir. 1968).

197. 392 Mich. 511, 221 N.W.2d 569 (1974).

198. MICH. COMP. LAWS ANN. § 768.36 (1982). See Schwartz, *Michigan's New Law on Criminal Responsibility—Moving Backward Confidently*, 54 MICH. ST. B.J. 847, 847-48 (1975).

199. IND. CODE ANN. § 35-5-2-3 (Burns 1981).

200. Act of Sept. 17, 1981, Pub. Act No. 82-553, 1981 Ill. Laws 2782 (codified at ILL. ANN. STAT. ch. 38, §§ 6-2, -4, 113-5, 115-1, -4, -6, 1005-2-5, -6 (Smith-Hurd Supp. 1982)).

201. Act of June 9, 1981, Pub. Act No. 81-301, § 1, 1981 Conn. Acts 437, 437 (to amend CONN. GEN. STAT. ANN. § 53a-13 (West Supp. 1982)).

202. Act of July 1, 1982, 1982 Ga. Laws 1476, 1477 (codified at GA. CODE ANN. § 27-1503 (Harrison Cum. Supp. 1982)).

203. Act of Mar. 26, 1982, ch. 113, § 7, 1981 Ky. Acts 199, 201 (to be codified in KY. REV. STAT. ch. 504).

204. N.M. STAT. ANN. § 31-9-3(A) (Cum. Supp. 1982).

sanity acquittal, some of the recipients of the guilty-but-mentally-ill verdict most likely would have been insanity acquittees without the new verdict. Jurors in those seven states can reach the new verdict as a compromise decision. They can choose to label the offender guilty with the assurance that the verdict will work for his own good; the qualification "but mentally ill" implies that treatment will follow. Indiana jurors are not aware that after a finding of guilty-but-mentally-ill the "court shall sentence him in the same manner as a defendant found guilty of the offense."²⁰⁵ Michigan and Illinois have substantially the same provision,²⁰⁶ while the Kentucky and New Mexico statutes do not even address the issue of informing the jury of the consequences of the verdict.²⁰⁷ At least in Connecticut and Georgia, unless the defendant objects, the jury shall be informed of the consequences of finding the defendant guilty but not criminally responsible whenever the court instructs the jury on the insanity defense.²⁰⁸ Connecticut, however, provides that only if the defendant is found insane and dangerous can he be confined for treatment up to the maximum sentence which could have been imposed if he had been convicted of the offense.²⁰⁹ The mental evaluation which the statute requires the court to order is nothing more than what any conscientious judge would provide for a convicted person exhibiting a possible mental disorder. Minnesota law contains virtually the same requirement.²¹⁰

Thus, at best, the guilty-but-mentally-ill verdict is misleading. The "but-mentally-ill" portion of the verdict has no legal effect other than to provide double stigmatization of the defendant: he's not only guilty but crazy as well—both "bad and mad."²¹¹ The verdict also misleads jurors into believing that they have accomplished something more than to decide guilt.

Adoption of the guilty-but-mentally-ill verdict cannot avoid increasing the cost and confusion in the administration of justice.

205. IND. CODE ANN. § 35-5-2-6 (Burns 1981).

206. Act of Sept. 17, 1981, Pub. Act No. 81-553, § 3, 1981 Ill. Laws 2782, 2878-88 (codified at ILL. STAT. ANN. ch. 38, §§ 1005-2-5, -6 (Smith-Hurd Supp. 1982)); MICH. COMP. LAWS ANN. § 768.36(3) (1982).

207. See Act of Mar. 26, 1982, ch. 113, 1981 Ky. Acts 199; N.M. STAT. ANN. § 31-9-3(A) (Cum. Supp. 1982).

208. Act of June 9, 1981, Pub. Act No. 81-301, § 2, 1981 Conn. Acts 437, 438; Act of July 1, 1982, 1982 Ga. Laws 1476.

209. Act of June 9, 1981, Pub. Act No. 81-301, § 3, 1981 Conn. Acts 437, 440.

210. MINN. R. CRIM. P. 20.01(2).

211. Schwartz, *supra* note 198.

The judge would need to instruct the jury to distinguish between the three verdicts. The defense would be entitled to an additional instruction on the effect of mental illness on the issue of verdict: 1) not guilty (includes not guilty by reason of insanity), 2) guilty, and 3) guilty but mentally ill. Few juries will be able to find their way through this maze of instructions.

If the Minnesota legislature perceives a need to reform the insanity defense, following the lead of Michigan would be counter-productive. Reform is needed to protect society and the rights of defendants, and to improve the administration of justice. The guilty-but-mentally-ill verdict causes more harm than good to each of these interests.

VI. CONCLUSION

The insanity defense is in trouble. Its overuse and abuse have caused it to fall into disrepute. Mental health reforms have lessened the ability of the government to restrain insanity acquittees. The defense causes unnecessary costs and stresses the criminal justice system.

Abolition of the defense sounds drastic. It is not. The requirement of proof of criminal intent and the companion doctrine of diminished capacity would adequately divert mentally ill offenders from criminal sanctions. Sentencing alternatives are sufficiently flexible and mild to accommodate mentally ill offenders without offending principles of fairness. In fact, abolition enhances fairness by eliminating the obvious advantages available only to intelligent and affluent defendants.

The volume of the debate and comment concerning the insanity defense attests to the need for reform. None of the many reforms adopted has provided a satisfactory result. The defense is too infirm to be cured. The insanity defense should be abolished.